

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

S
75-1082

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee,

-against-

MARIE WILEY and
NATHANIEL JAMES,

Appellants.

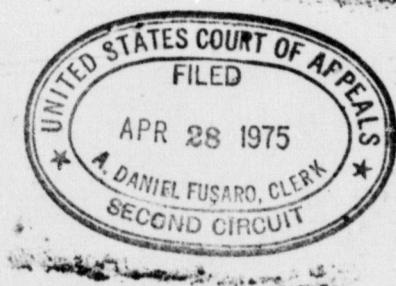
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Docket No. 75-1082

JOINT APPENDIX TO APPELLANTS' BRIEFS

ON APPEALS FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

1
HOWARD L. JACOBS, ESQ.,
Attorney for Appellant
MARIE WILEY
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New York, New York 10007
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WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
NATHANIEL JAMES
SHEILA GINSBERG, Of Counsel
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509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971



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PAGINATION AS IN ORIGINAL COPY

JUDGE CANNELLA

74 CRIM. 504

TITLE OF CASE	ATTORNEY'S
THE UNITED STATES vs. CHARLES CLARK, a/k/a Nick -all cts.	For U. S.: Harry C. Batchelder, AUSA 264-6293
MARIE WILEY-1-3	
NATHANIEL JAMES-all cts.	
	For Defendant: C.E.Clark..Piaggi,Ehrlich & Lang 299 B'Way NYC

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(07) Fine,					
Clerk, S.S. 31292					
Marshal,					
Attorney,					
Kommisioner Comx 21					
Waiver 846,812,841(a)(1),(b)					
Consp. to viol. Fed. Narcotic Laws. (Ct.1)					
Distr. & possess. w/intent to distr.					
Cocaine, II. (Cts. 2-4)					
(Four Counts)					

DATE	PROCEEDINGS
5-17-74	Filed indictment and ordered sealed. B/W ordered. Gurfine, J. B/W issued.
7-16-74	Indictment ordered unsealed. Duffy, J.
7-29-74	No appearance by defts. Court directs plea of not guilty as to all three defts. B/Ws ordered as to all defts. Case assigned to Judge Cannella for all purposes. Stewart, J.
7-29-74	ALL DEFTS- Bench warrants issued.
7-30-74	B/Ws ordered as to all defts. Stewart, J.
8-9-74	Filed Govt's notice of readiness for trial.

— OVER —

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
10-8-74	CHARLES CLARK - Filed papers recv'd from magistrate: Docket sheet, warrant, disposition sheet, notice of appearance and appearance bond.		
10-9-74	NATHANIEL JAMES - Filed papers recv'd from magistrate: Docket sheet, warrant, disposition sheet, & appointment of counsel.		
10-30-74	MARIE WILEY - Filed Govt's voir dire.		
11-15-74	NATHANIEL JAMES - Filed warrant of arrest with marshals return..		
11-22-74	Filed requests to charge.		
11-26-74	Filed Govt's supplemental request to charge.		
11-25-74	MARIE WILEY NATHANIEL JAMES - Trial begun with Jury before Cannella, J.		
11-26-74	Trial cont'd. COUNTS 2 & 3 are DISMISSED as to Deft JAMES		
11-27-74	Trial cont'd. and concluded. Deft WILEY GUILTY on count 1...NOT GUILTY on counts 2 & 3...Deft JAMES GUILTY ON count 1 NOT GUILTY on count 4... P.S.I. ordered Sent. 12-18-74 at 9:30 a.m. R.619 Present bail conditions as to deft WILEY....Deft JAMES remanded.....Cannella, J..		
12-9-74	CHARLES CLARK: Deft. (atty Gordon Lang present) pleads not guilty. Bail fixed in the amount of \$10,000 PRB co-signed by Miss Joyce Ramsey to cover this indictment and indictment 74 Cr. 989. Bail limitations extended to the District of Atlanta, Ga. Cannella, J.		
12-9-74	Charlie Clark - Filed PRB in the sum of \$10,000.00 (Related to 74 CR 989) (unsecured)		
1-22-75	MARIE WILEY - Filed Judgment(Atty. Howard Jacobs, present) The deft is committed for a period of SEVEN YEARS on count 1...Deft placed on Special Parole for a term of THREE YEARS to commence upon her expiration of confinement, pursuant to Ti.21, U.S.Code, Sec.841....Deft Remanded.....CANNELLA, J.....Ent. 1-23-75---- Bail fixed at \$25,000 cash or surety pending appeal....		
1-28-75	Filed transcript of record of proceedings, dated Nov. 26, 27, 1974 JAN. 23, 1975.	Dec. 18 1974	

DATE	PROCEEDINGS
1-30-75	MARIE WILEY - Bail application(Atty.present)Deft did not appear Court reduces bail from \$25,000 cash or surety to \$15,000cash or surety pending appeal... Cannella,J.....
2-11-75	CHARLES CLARK, a/k/a Nick - Filed Govt's requests to charge
2-11-75 ***	CHARLES CLARK, a/k/a Nick - Filed Govt's voir dire
1-22-75	MARIE WILEY - Filed notice of appeal(Nunc pro tunc)from judgment of Jan.22,1975 copy mailed to Atty.Howard Jacobs 401 B'Way NYC and given to U.S.Atty's office. Leave to appeal in forma pauperis is granted....Cannella,J.
2-19-75	MARIE WILEY - Filed notice that the original record has been certified and transmitted to the U.S.C.A..
3-13-75	NATHANIEL JAMES - Filed Judgment(Atty.Roland Thau,present)Deft. is committed for imprisonment for a period of THREE YEARS on count 1..Deft. is placed on special parole for a term of THREE YEARS, to commence upon the expiration of confinement, pursuant to Ti.21, U.S.Code, Sec. 841....Cannella,J... Deft is Remanded.....Ent. 3-14-75-----
3-14-75	CHARLIE CLARK - Deft & Atty.present,withdraws plea of not guilty and pleads GUILTY to Ct.1 only..P.S.I. ordered sent.5-14-75 at 11:00 a.m. bail cont'd....Cannella, J...
3-14-75	NATHANIEL JAMES - Filed notice of appeal from judgmt.of 3-13-75 Leave to file notice of appeal in forma pauperis is granted...Cannella,J..Copy given to U.S. Atty. and mailed to deft at 215 W. 101 St. NYC Apt.5D
3-24-75	N.JAMES - Filed commitment & entered return, Deft delivered to <i>Floyd Detention Hdgll</i> <i>m-y-c.</i>
3-26-75	M.Wiley Filed commitment & entered return, Deft delivered to <i>Women's Detention</i> <i>Center Rikers Island m-y-c.</i>

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 CRIM. 504

UNITED STATES OF AMERICA,

-v-

INDICTMENT

CHARLES CLARK a/k/a "Nick",
MARIE WILEY and
NATHANIEL JAMES,

74 Cr.

Defendants

MAY 17 1974

The Grand Jury charges:

1. From on or about the 1st day of October 1973,
and continuously thereafter up to and including the date of
the filing of this indictment, in the Southern District of
New York, CHARLES CLARK a/k/a "Nick", MARIE WILEY and
NATHANIEL JAMES,

the defendants and others to the Grand Jury unknown, unlaw-
fully, intentionally and knowingly combined, conspired, confederat
and agreed together and with each other to violate Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendants unlawfully, intentionally and knowingly would distribu
and possess with intent to distribute Schedule II
narcotic drug controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

MCARL/14
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OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

- (1) On or about October 17, 1973 the defendant MARIE WILEY left the White Rose Bar at 85th Street and Amsterdam Avenue and returned a short time thereafter with the defendant CHARLES CLARK a/k/a "Nick".
- (2) On or about October 17, 1973 the defendant CHARLES CLARK a/k/a "Nick" drove in a 1973 pink Lincoln Continental registered in the name MARIE WILEY to the vicinity of the Casbah Lounge at 106th Street between Columbus and Amsterdam Avenues, New York, New York.
- (3) On or about October 17, 1973 the defendant CHARLES CLARK a/k/a "Nick" gave a free sample of cocaine away.
- (4) On or about October 17, 1973, in the vicinity of 85th Street and Amsterdam Avenue, the defendant CHARLES CLARK a/k/a "Nick" sold three aluminium foil packages containing approximately 30.95 grams of cocaine hydrochloride for \$1200.
- (5) On or about October 24, 1973 the defendants MARIE WILEY and CHARLES CLARK a/k/a "Nick" drove to the vicinity of 16 West 89th Street, New York, New York.
- (6) On or about October 24, 1973 the defendants MARIE WILEY and CHARLES CLARK a/k/a "Nick" while parked in a vehicle in the vicinity of 16 West 88th Street, New York, New York sold approximately 27.26 grams of cocaine hydrochloride for \$1200.
- (7) On or about October 31, 1973 the defendants NATHANIEL JAMES and CHARLES CLARK a/k/a "Nick" met at the Blue Rose Bar at 85th Street and Amsterdam Avenue, New York, New York and then exited the Bar and traveled in a 1973 White Eldorado with a black vinyl top to the vicinity of 104th Street and West End Avenue, New York, New York where they parked.
- (8) On or about October 31, 1973 while parked in a 1973 White Eldorado with a black vinyl top in the vicinity of 104th Street and West End Avenue, New York, New York the defendant CHARLES CLARK a/k/a "Nick" gave away a free sample of cocaine.
- (9) On or about October 31, 1973 while parked in a 1973 White Eldorado with a black vinyl top in the vicinity of 85th Street and Amsterdam Avenue the defendants CHARLES CLARK a/k/a "Nick" and NATHANIEL JAMES sold approximately 89.18 grams of cocaine hydrochloride for \$3,300.

SECOND COUNT

The Grand Jury further charges:

On or about the 17th day of October, 1973,
in the Southern District of New York, CHARLES CLARK a/k/a
"Nick", MARIE WILEY and NATHANIEL JAMES,

the defendants , unlawfully, wilfully and knowingly did
distribute and possess with intent to distribute a
Schedule II narcotic drug controlled substance, to wit,
approximately 30.95 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A); Title 18, United
States Code, Section 2.)

HCB,Jr.:ais

THIRD COUNT

The Grand Jury further charges:

On or about the 24th day of October, 1973,
in the Southern District of New York, CHARLES CLARK a/k/a
"Nick", MARIE WILEY, and NATHANIEL JAMES,

the defendant s , unlawfully, wilfully and knowingly did
distribute and possess with intent to distribute a
Schedule II narcotic drug controlled substance, to wit,
approximately 27.26 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A); Title 18, United
States Code, Section 2.)

FOURTH COUNT

The Grand Jury further charges:

On or about the 31st day of October, 1973,
in the Southern District of New York, CHARLES CLARK a/k/a
"Nick" and NATHANIEL JAMES,

the defendants , unlawfully, wilfully and knowingly did
distribute and possess with intent to distribute a
Schedule II narcotic drug controlled substance, to wit,
approximately 89.18 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A); Title 18, United
States Code, Section 2.)

Richard Eberige
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

74 CRIM. 5044

Form No. USA-31s-274 (Ed. 2-23-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CHARLES CLARK a/k/a "Nick",
MARIE WILEY and
NATHANIEL JAMES,

Defendants.

JUL 16 1974

INDICTMENT

(21, U.S.C. §§ 846, 812, 841(a)
(1) and 841(b)(1)(A)
18, U.S.C. § 2)

JUL 18 1974
McLaughlin

JUL 29 1974

74 Cr. PAUL J. CURRAN
United States Attorney.
A TRUE BILL

Richard S. Nichols
Foreman.

DeLoach

AD Attorney L. I.

S. S. DISTRICT COURT
FILED
MAY 17 1974
S. D. OF N. Y.

7-30-74 Plaintiff's order was stayed

5/17/74 Plaintiff's order was stayed
by letter or substituted
order dated 5/17/74

10-11-74 - DEF'T. CLARK DID NOT APPEAR - ATTY. PRESENT

B/W ISSUED - BAIL PREFERENCE TO GO THRUCAJ

CANNELLA, J.

25 NOV 1974 - TRIAL BEGAN BEFORE CANNELLA, J WITH A
JURY AS TO DEF'TS. WILEY & JAMES.

26 NOV 1974 - TRIAL CONTINUED - COUNTS 2 & 3 ARE DISMISSED
AS TO DEF'T. JAMES

27 NOV 1974 - TRIAL CONTINUED - AND CONCLUDED
JURY VERDICT - DEF'T. WILEY GUILTY ON COUNT 1
NOT GUILTY ON COUNTS 2 &
DEF'T. JAMES GUILTY ON COUNT 1
NOT GUILTY ON COUNTS 2 &
JURY SOLED

PSI ORDERED SENT ON 12-18-74 AT 9:00 AM R 619
DEF'TS. RESERVED RIGHT TO MAKE MOTIONS ON DAY OF S.
PRESENT BAIL CONDITIONS AS TO DEF'T. WILEY.
DEF'T. JAMES RECOMMENDED

CANNELLA, J.

(RW)

RE-ENTER

DEFT CHARLES CHAN - (ATTY. PRESENT) (CONT'D) (CONT'D)

BAIL FIXED IN THE AMOUNT OF \$10,000⁰⁰ PP.B. PURSUANT
BY MISC JUDGE RAMSEY TO COVER THIS INDICTMENT

INDICTMENT NUMBER 99-19. BAIL EXPIRES EXTENDED
TILL DATE OF 3/27/75. BAIL REMAINS EXTENDED
TILL DATE OF 3/27/75.

CHANCELLOR J.

32 JAN 1975 ARTH F. GUERONI

DEFT. MARIE N. LEY - (ATTY. PRESENT) (HONORABLE JUDGE) (CONT'D)
SENTENCED TO SEVEN (7) YEARS, IN CT. I, DEFT. PLACED ON SPECIFIC
FOR A TERM OF THREE (3) YEARS, TO COMMENCE UPON ^{THE} EXPIRATION OF
CONFINEMENT, PURSUANT TO T. 21, USC, SEC: 841.

BAIL FIXED IN THE SUM OF \$25,000⁰⁰ CASH OR SECURITY TO BE REMITTED
PENDING APPEAL. DEFT. REMOVED IN LIEU OF BAIL PENDING
CARRERA J.

22 JAN 1975

R

DEFT. NATHANIEL JAMES - (ATTY. PRESENT) (HONORABLE JUDGE)
SENTENCED ADDITIONAL SINE DIE

CHANCELLOR J.

7-20-75-

DEPT-MARIE WILEY-BAIL APPLICATION (ATTY PA)
DEPT-DID NOT APPEAR - COURT REDUCES BAIL FROM
25,000⁰⁰ CASTOR SURVEY TO 15,000⁰⁰ CASTOR SURVEY AND
APPEAL

TIME, no later

TIME

CANNELL

2:00 P.M. NO LATER

RE: DEPT. MARIE WILEY-BAIL APPLICATION

2 CHARGE OF THE COURT

3 CANNELLA, J.:

4 Members of the jury, we have gotten to the stage
5 now where it is my obligation to charge you on the law in
6 this case.7 I want to thank the lawyers for the assistance
8 they have been to the Court with respect to the various
9 questions of law that were discussed at the side bar. I am
10 sure that they presented the case in such a fashion that I
11 think they will help you in arriving at a proper judgment in
12 this case.13 As you reflect upon the facts you will remember
14 that there are three occasions involved, one on the 17th, the
15 other on the 24th, the last on the 31st. We concede there
16 are areas of agreement between these parties.17 There is no question that there is such a thing
18 as the Blue Rose Bar, and that these people were in the bar,
19 and certain things happened. As I say, there is no dispute
20 about that.21 However, in certain other areas there are serious
22 disputes between the parties, and, of course, it is because
23 of these areas, where there are disputes, that you have been
24 selected as jurors. If there were no disputes on the facts
25 then the Court would decide the case and the law, and that

2 would be the end of it, because the facts would be agreed
3 upon.

4 As far as the facts are concerned, you are the
5 sole and sovereign judges of the facts. You are also the
6 sole judges of the credibility of the witnesses. That is
7 your obligation and your duty, and no one can trespass on
8 that.

9 The lawyers have told you about the facts, and
10 if I happen to mention the facts any further than I have and
11 they don't coincide with your recollection of what the facts
12 are, use your own recollection and not mine. As I say again,
13 you are the sole judges of the facts.

14 The law you must accept from the Court, even
15 though you may not agree with it. The simple reason for that
16 is that if you use your own law and decide this case on what
17 you believe the law should be, then a higher court could
18 never rectify any errors because they would never know upon
19 what it was based. So you must accept the law from the Court
20 and apply it to the facts.

21 We know that in a criminal case, particularly in
22 a federal case, every defendant is presumed innocent unless
23 and until the government proves guilt by credible evidence
24 beyond a reasonable doubt. This burden that the government
25 has remains with the government throughout the trial. As a

2 matter of fact, it exists now, and even when you go into the
3 jury room, until the case is over; that burden never shifts
4 to the defendants.

#26 5 The defendants are, essentially, charged with
6 two sorts of crimes. One is a conspiracy and the other
7 represents specific violations of the statute, which are
8 called substantive offenses.

9 The statute involved is the federal control
10 statute which, in effect, says that you may not distribute
11 or possess with intent to distribute any of the scheduled
12 drugs that are mentioned in the schedules that follow, and
13 one of the scheduled drugs is cocaine hydrochloride. That
14 is the particular law involved.

15 The tool used by the parties to prove a point,
16 if they desire to do so, and, of course, the government has
17 an obligation to present evidence, and, repeated more than
18 once, the defendants do not, it is called evidence and
19 evidence can be described in a number of ways. It can be
20 described by its quality and quantity. The quality of
21 evidence must be beyond a reasonable doubt. What do we mean?
22 The quality evidence is credible evidence. It must be
23 believable evidence.

24 The quantity of the evidence is beyond a reason-
25 able doubt. What do we mean by "beyond a reasonable doubt"?

2 A reasonable doubt means a doubt that is based
3 on reason and must be a substantial rather than speculative
4 doubt. It must be sufficient to cause a reasonably prudent
5 person to hesitate to act in the more important affairs of
6 his life. It can come from a consideration of the evidence,
7 as you have heard it, or from the lack of evidence that is
8 present in the case.

9 Evidence can also be divided into sections in
10 the following fashion: there is oral evidence, which means
11 the testimony of the witnesses who come here and tell you
12 what they have learned through the use of their senses. That
13 also includes any natural inferences that flow from that
14 testimony and includes anything that has been brought out on
15 cross-examination. Anything that has been testified to during
16 the course of the trial is evidence, and you must consider it.
17 You don't have to believe it but you must consider it. You
18 may simply not reject all evidence and give it no consider-
19 ation. You cannot do that.

20 Another division is called documents, and
21 documentary evidence is represented by exhibits in the case,
22 and they may be, in addition to documents, like in this case,
23 the cocaine which the chemist has indicated is cocaine hydro-
24 chloride. Anything that was received in evidence you may
25 consider during the course of your deliberations.

2 The next thing that you would consider would be
3 the stipulations. Here, for example, there are two that I
4 recall. One is that the car belonged to Miss Wiley and the
5 other one was that the chemist, who was the person who could
6 make an analysis, made an analysis of the substance and dis-
7 covered it to be cocaine in the amounts and strengths he
8 indicated in his report.

9 Lastly, what is evidence is what the Court takes
10 judicial notice of. There are a large number of things that
11 the Court knows everybody knows, and there is no need to
12 prove it. One of the factors, for example, is that there
13 were locations mentioned during the course of this testimony
14 within Manhattan. They are within the Southern District of
15 New York, and, therefore, we have a right, I as the Judge,
16 to hear it, and you, as the jury, to pass judgment in this
17 case.

18 In order to know how to treat the various facts
19 in this case on whether or not you should consider them, you
20 also have to know what is not evidence. For example, you
21 have known from the beginning when I first selected you that
22 the indictment is not evidence. It is only evidence that the
23 grand jury acted and made an accusation on. It is an
24 accusation. There was no trial. There were no defendants'
25 witnesses. There were no lawyers on the part of the

2 part of the defendants. They have simply made an accusation
3 and said it is probable that a crime was committed and that
4 these defendants probably committed it, and that's all they
5 did. The defendants came in and pleaded not guilty to this.
6 Therefore, they put the government on its proof as to each
7 and every material element contained in this particular
8 charge, in this particular indictment.

9 There is one thing that has happened in your
10 absence which I make known to you now, and that is that
11 although there are four charges here, as a matter of fact,
12 as against Miss Wiley, only three charges are open at the
13 present time. Those charges are numbers 1, 2, and 3, the
14 conspiracy and two substantive charges.

15 As regards Mr. James as a matter of law, which
16 has nothing to do with the facts of the case, and are of no
17 concern of yours whatsoever, I have dismissed Counts 2 and 3.
18 So as far as James is concerned, we are trying him only on
19 the conspiracy charge and on the alleged happening on
20 October 31st, which is the fourth count in the indictment.

21 Those are the charges that you will report on.

22 Another thing that is not evidence are questions
23 that are asked which are not answered. a very glaring one
24 in this case here is whether or not Miss Wiley and Clark
25 were living together. There is not one shred of evidence in

2 all that they were living together. It was only contained in
3 the questions which Mr. Jacob asked, which was never answered,
4 and you may not say to yourself since it is part of the
5 question it must be evidence. It is not evidence until it is
6 proven. The same applies to any other question that was
7 asked and was not answered: you may not assume that what
8 was in the question is a fact.

9 Any comments between the lawyers and the Court or
10 between themselves is not evidence, for the simple reason
11 that they were not sworn. We did not testify in this case.
12 So anything that the lawyers have said or the Judge has said
13 about the case, as far as the facts are concerned, is not
14 evidence.

15 How do you find out where the truth lies in this
16 case? That is, essentially, the chief job that you have.
17 The chief thing you do here is discover where the truth lies.
18 Well, the first thing that you do is observe the demeanor of
19 the witness. How did Mrs. Johnson impress you? Did she seem
20 to be testifying freely? Did she seem to testify in accord-
21 ance with the facts as you have already found them because
22 you listened to the case? The other agent that came in and
23 testified, how about him? How did he impress you? How did
24 he answer?

25 One of the lawyers said that one of the main

2 gauges you have in making a determination as to where the
3 truth lies is using your common sense. In other words, you
4 use that same fine discernment, that same fine judgment, that
5 you do in everyday matters of grave importance to you. You
6 are going to buy a house. You listen to the broker. Or you
7 want to buy a car, you listen to the car salesman. You look
8 around and make investigation here and there, and then you
9 come up with a judgment using your common sense. There is
10 nothing different about analyzing these witnesses on the
11 stand. You use the same common sense you have in your every-
12 day life.

13 Look into the interests of the witness; that will
14 assist you. The two witnesses that testified were agents.
15 That doesn't mean to say that every agent, as I told you when
16 you were being selected as jurors, because of the fact they
17 are agents are more special than anybody else. They are not
18 to be believed any more nor are they to be believed any less.
19 They are like other witnesses with the exception that they
20 are working for the government. They are agents. They want
21 to do a good job. You keep their background in mind in
22 determining what you are going to do about the testimony you
23 have heard, whether you are going to accept it or reject it.

#27

24 If you find that any witness has falsely testified
25 to a material fact in this case, you must disregard that

2 portion of the testimony which is false. As a matter of
3 fact, you can disregard the entire testimony of that witness
4 if you find that that is what you want to do. That is a
5 judgment you will have to make.

6 There is more than one defendant in this case.
7 It is what we call a multiple defendant case because there is
8 more than one. Where two or more persons are charged with
9 the commission of a crime, the guilt of one defendant may be
10 established without proof that all the defendants perpetrated
11 or did every act constituting the offense charged. You must
12 give separate consideration to each individual defendant and
13 to each separate charge against them. Each defendant is
14 entitled to have his or her case determined from his or her
15 own conduct and from the evidence which may be applicable to
16 him or to her.

17 Evidence is also divided, sometimes, as direct
18 evidence and circumstantial evidence.

19 Direct evidence is evidence of an eyewitness;
20 for example, a person who comes in and tells you what he has
21 seen.

22 Circumstantial evidence is evidence, like a
23 chain of events that leads you to other conclusions.

24 The law makes no distinction between direct
25 evidence and circumstantial evidence. What it says is that

2 you must be satisfied at the end of hearing all the evidence,
3 direct, circumstantial or both, or a combination, of the
4 defendant's guilt beyond a reasonable doubt before you may
5 convict him. That's the only requirement. There is no
6 requirement that it must be by all direct evidence, or all
7 by circumstantial evidence. We act on circumstantial
8 evidence every day of our life and since some of the elements
9 of this case require mental process on the part of the
10 defendants because they must act unlawfully, knowingly,
11 willfully -- these are mental processes. You don't see them
12 around in the air, or you don't see them written down some
13 place. The way you discover whether or not a person is
14 thinking something is to watch what he does and see what he
15 does and hear what he says, and so forth, and, as a result
16 of that examination, you can come to the conclusion that
17 something is going on which he is willing to do and which he
18 is doing because he wants to do it: he is doing it
19 voluntarily and so in determining that aspect of it, circum-
20 stantial evidence helps you, and you will look into all the
21 circumstances in the totality of the evidence in this case
22 and come up with a verdict in the case. That's the only way
23 you can decide this case.

24 I will define for you a number of terms that are
25 used in these legal documents which you are going to get a

2 copy of, and I will explain it to you in a very short time.

3 Some of the terms that are used in here ordinary laymen do
4 not know too much about and, therefore, I will define them
5 for you so you know what they mean.

6 "Unlawfully" is a very simple concept. It means
7 against the law, and, in this particular case, it means
8 against the federal narcotics control law. That's what we
9 mean here by "unlawfully."

10 "Knowingly" means to do something voluntarily,
11 not through mistake, not through inadvertence, and not
12 through good faith. "Knowingly" is described in another
13 section under another statute as "intentionally."
14 "Intentional" and "knowingly" are practically interchangeable.
15 When you do something intentionally you are doing it knowing
16 what you are doing and you are doing it voluntarily and you
17 are not doing it through mistake, error, or inadvertence.
18 So those two concepts are practically the same.

19 "Willfully" adds another concept. "Willfully".
20 means to do something voluntarily and intentionally, and to
21 do it not in good faith, by inadvertence, or in error, but
22 to do what the Romans used to do, mens rea, the evil mind,
23 the bad motive. You are doing it with the purpose of
24 violating the law. That's what we mean when you act willfully.
25 To act willfully is to act in violation of the law knowing

that you are in violation of the law. That's the meaning of the three words.

Essentially, what they mean is that you know what you are doing and you purposely violate the law. That's what it amounts to.

We have another term in here, a group of them, which essentially means the same thing: combine, conspire, confederate, and agree.

The essence of the charge of conspiracy is gained from an examination of the word itself. The word "conspire" comes from the Latin conspirare, which means to breathe together. It has a sort of secrecy, sort of a sense of agreement that the general people around you don't know what you are doing. It is much like football players in a huddle. When they get in there and huddle the same concept exists as in a conspiracy. That's what a conspiracy means.

A conspiracy is very simply defined: it simply means an agreement between two or three persons to do an unlawful act, or to do something which is lawful by unlawful means.

In addition to that, however, the law requires, because we don't punish for thoughts alone, that something be done about it, something be done in furtherance of it. That is called an overt act.

2 Essentially, the conspiracy is simply an agreement
3 between two or three or more persons to violate, in this
4 case, the federal narcotics law concerning cocaine, and some-
5 thing further is done to accomplish that purpose. They are
6 the overt acts in the indictment.

7 The government need prove only one of them.
8 There is no need to prove the whole nine of them. If the
9 government proves one of them, that is sufficient, provided
10 it is done by one of the conspirators in furtherance of the
11 conspiracy and during the life of the conspiracy.

12 The overt act can be a legal act. It does not
13 have to be an illegal act. For example, if two people con-
14 spire to rob a bank and they are going to do it at night time,
15 one fellow says, "I will get a car," and the other fellow
16 says, "I will get a flashlight." The last fellow goes down
17 to the five and ten cents store to buy a flashlight. That is
18 a perfectly legal act, but when he uses it, or intends to use
19 it to commit a crime, that overt act completes the agreement
20 and a conspiracy is established at that point. Anybody that
21 is in it unlawfully, willfully, and knowingly at that point
22 in time is guilty of the conspiracy, just like everybody else
23 what is in the conspiracy.

24 I will give you a further exposition on a
25 conspiracy when we get to the first count, which we will get

2 to in a minute or two, at which time I will give you all the
3 elements similar to when I charged during the course of the
4 trial. It is practically the same as I did at that time.

5 The three substantive counts mentioned the word
6 "distribute." That simply means to pass on to another
7 person. In the context of this case it is a sale such as a
8 passage, and that would be to distribute. If you find there
9 was a sale here that would be a distribution in the sense
10 in which it is used in the statute.

#28 11 Now we turn to the word "possess." Immediately
12 following the word "distribute" in that particular section
13 of the law it says "distribute or possess with intent to
14 distribute." Possession can be actual possession, just like
15 I am holding these glasses now. On the other hand, it can
16 be constructive possession.

17 Constructive possession is possession which gives
18 the one that has constructive possession dominion and control
19 over something. It does not have anything to do with owner-
20 ship. You don't have to own anything. If I go to Hertz
21 Rent-a-Car and I take one of their cars, they are the owners
22 of the car. When I get in and drive it away, I am actually
23 in possession; I am driving it away. When I bring it to my
24 house and put it alongside of my house and I lock it with a
25 key, take the key and put it in my pocket, and go inside my

2 door, I have constructive possession of that car, because I
3 have the ability to exercise dominion over it by simply going
4 out there and putting the key in it and driving off, although
5 I am not physically in the car. Therefore I have constructive
6 possession. In that example I have sole constructive
7 possession. I have the only key. I am the only one. If I
8 go inside and give another key to my son who is in the house
9 and he says to me, "Can I use the car?" And I say, "Here is
10 the key; whenever you want to use it, use it," at that point
11 in time he has constructive possession. We have joint con-
12 structive possession. Either one of us can go out and get
13 into the car and drive it off.

14 When he goes out into the car and gets in it, he
15 has actual possession at that time as well as constructive
16 possession. I still remain with constructive possession.
17 I am not in the car, but I have the ability to exercise
18 dominion over it because I have the key. In the context of
19 this case, of course, the possession that is involved is the
20 possession with intent to distribute, which means to transfer
21 it to somebody else or to sell it to somebody else.

22 With respect to cocaine, I take judicial notice
23 that cocaine hydrochloride is a scheduled substance under
24 this particular Act, and you have the testimony by way of
25 stipulation of the chemist that the substance in this case

2 was a narcotic, namely, cocaine hydrochloride.

3 Now, getting down to the indictment itself, this
4 is the document which contains the charges. The first two
5 pages of this document contain the conspiracy charge and it
6 goes like this:

7 'On or about the 1st day of October, 1973, and
8 continuously thereafter, and including the date of filing
9 of the indictment -- what was the filing of the indictment?
10 It was May 17th, 1974. That doesn't mean to say that the
11 government has to prove that the conspiracy started on
12 October 1st and ended up in May. It only means that it must
13 be within that period.

14 The charge here is that the first incident
15 happened on October 17th, which was within the period. The
16 second one occurred on the 24th; the third one on the 31st;
17 all within the period mentioned in the indictment.

18 The second thing is that it must be in the
19 Southern District of New York. I have told you already that
20 I take judicial notice these areas that the witnesses have
21 been talking about are within the Southern District of New
22 York.

23 It then says the defendant Charles Clark, also
24 known as Nick, Marie Wiley and Nathaniel James, unlawfully,
25 intentionally, and knowingly -- and I have described to you

2 what that means -- voluntarily acted, not mistake, or error,
3 or inadvertence, but with an intention to violate the federal
4 law -- that's the way they must act.

5 Then it goes on to say that they combined, con-
6 spired, confederated and agreed together. That is the con-
7spiracy charge. I have defined that for you and told you
8 what that is.

9 And that particular area I will read to you
10 again because I do not think you remember what I said before
11 what the rules are concerning a conspiracy charge.

12 We know, of course, that the conspiracy charge
13 is to violate the Federal Narcotics Control Act.

14 A conspiracy is a combination of two or more
15 persons to accomplish an unlawful purpose or unlawful purpose
16 by unlawful means. That's repetitious, but that is essential-
17 ly the definition of a conspiracy. While it involves an
18 agreement it is not necessary that the persons charged meet
19 together and enter into an express or formal agreement, or
20 that they state in words or in writing what the scheme was
21 and how it was to be effected. It is sufficient to show that
22 they tacitly came to a mutual understanding to accomplish
23 an unlawful purpose in violation of the Narcotics Control Act.

24 An agreement may be inferred from the circum-
25 stances and the conduct of the parties since ordinarily a

2 conspiracy is characterized by secrecy. In determining
3 whether the evidence establishes the conspiracy and the
4 defendant's participation in it, you should consider the acts
5 and declarations of all of the alleged participants.

6 Mr. Thau espoused on the law in this particular
7 area, and his exposition of that was not correct. It is
8 true that not too long ago in this district they used to say
9 that the way you find out whether a defendant participated
10 was that you looked to what he did and what he said. That
11 is not the law in this district now and you must accept the
12 law from the Court.

13 In determining whether there is a conspiracy and
14 in determining whether the defendant participated in the
15 conspiracy, you look to the acts and declarations of all the
16 parties and anything that happened during the course of the
17 events which you have under consideration.

18 To be a member of a conspiracy the defendant need
19 not know all of the other members, need not know all of the
20 details of the conspiracy, need not know the means by which
21 the objects were to be accomplished. Each member of a
22 conspiracy may perform separate and distinct acts.

23 It is necessary, however, that the government
24 prove beyond a reasonable doubt that the defendant was aware
25 of the common purpose and had an intent to advance it in

2 that he was a willful participant.

3 The extent of the defendant's participation is
4 not determinative of his guilt or innocence. A defendant
5 may be convicted as a conspirator even though he plays a
6 minor part in the conspiracy. His financial stake, if any,
7 in the venture is a factor to be considered in determining
8 whether a conspiracy existed and whether or not the defendant
9 was a member of it.

10 Mere presence at the scene of a crime and the
11 knowledge that a crime is being committed are not sufficient
12 to establish that a defendant aided and abetted the crime,
13 unless you find beyond a reasonable doubt that the defendant
14 was a participant and not merely a knowing spectator. By
15 "aiding and abetting" we mean as follows:

16 Whoever aids, abets, counsels, commands, induces,
17 or procures the commission of a crime is punishable as a
18 principal. In order to aid or abet the commission of the
19 crime, the person must associate himself with the criminal
20 venture, participate in it, and try to make it successful.

21 If it is established beyond a reasonable doubt
22 that a conspiracy existed and that the defendant was one of
23 the members, then the acts and declarations of any other
24 member of such conspiracy, in or out of the defendant's
25 presence, done in furtherance of the objects of the conspiracy

2 and during its existence, may be considered as evidence
3 against the defendant. When men enter into an agreement for
4 an unlawful purpose they become agents of one another.

#29

5 However, statements of any conspirator which are
6 not in furtherance of the conspiracy or made before its
7 existence or after its termination may be considered as
8 evidence only as against the person making them.

9 In reference to the overt acts in this indictment
10 it is not necessary that all the overt acts charged in the
11 indictment were performed. One overt act is sufficient, and
12 an overt act means any act committed by one or more of the
13 conspirators to accomplish the purpose of the conspiracy.
14 It may not be in violation of the law, and the other
15 conspirators need not join in it nor even know about it. It
16 is necessary only that the act be in furtherance of the
17 purpose or object of the conspiracy.

18 That is the law of conspiracy as it applies to
19 this particular charge here, and we have reached the point
20 in the indictment where that word is used, and that's why I
21 have given you the law on that.

22 The second paragraph of this indictment is the
23 means that was used to effect the conspiracy that is alleged
24 by the government and the means used here was to distribute
25 and possess with intent to distribute. That's all the second

2 paragraph does. It tells you the means by which the
3 conspiracy was to be effected.

4 Then, lastly, we have the overt acts, which are
5 nine in number, and you recall you need find only one. It is
6 not necessary for you to find all of them.

7 If you find that the government has proven all
8 these elements which I have just gone through with you by
9 credible evidence beyond a reasonable doubt, then you should
10 convict the defendant of that charge.

11 Remember, I told you you must consider each
12 defendant separately. Consider first one and then the other,
13 and then make a judgment as to whether or not that defendant
14 is guilty as charged.

15 On the other hand, if the government has failed
16 to prove any one or more or all of the elements which I have
17 just gone through with you, then it is your obligation to
18 acquit that particular defendant.

19 We have three substantive charges. They are all
20 based on the same statute. They all have the same language.
21 The only thing that is different about them is the date.
22 One is October 17th, another is October 24th, and the third
23 is October 31st.

24 The first two, the 17th and the 24th, name all
25 three defendants. The last one only names James and Wiley.

2 When you go through this indictment, as far as
3 Miss Wiley is concerned, what you consider first is this:
4 Is she guilty of the conspiracy charge? As far as she is
5 concerned, you only have two more counts. She is not named
6 in the last one. She is only named in the next two, Counts
7 2 and 3. As far as those are concerned, before you can
8 convict her you will have to find it happened on or about the
9 day in question. On Count 2 it is the 17th of October and
10 on Count 3 it is the 24th of October, 1973. That means not
11 the exact date, but on or about.

12 All the testimony has been very specific. One
13 is the 17th. The other is the 24th. The last one is the
14 31st.

15 It goes on to say that in the Southern District
16 of New York -- and as I have told you before I have already
17 taken judicial notice that these incidents happened in the
18 Southern District if they happened at all. It is alleged that
19 they happened.

20 The defendants Charles Clark and Marie Wiley
21 unlawfully, willfully, and knowingly -- and here, again,
22 those three words mean the same thing -- acted voluntarily,
23 not through mistake or inadvertence, and acted with intent
24 to violate federal law, with a bad motive, did knowingly
25 distribute -- and I have told you what "distribute" means.

2 In the context of this case the sale is to distribute and
3 possess with intent to distribute, and here, again, I told
4 you the definition of possession. This is the conjunctive
5 here. It says distribute and possess with intent to
6 distribute. That doesn't mean to say that the government
7 has to prove both of them. It could prove either one or
8 both of them. That will satisfy. If there was a sale and
9 you are satisfied to that, that will satisfy this element in
10 this particular indictment.

11 A Schedule II narcotic drug, namely cocaine --
12 I have already told you that I am taking judicial notice
13 that it is a Schedule II drug. The chemist has testified
14 that that's what the substance is on these particular counts.
15

16 If you find that the government has proven each
17 of these elements as to Miss Wiley, on Counts 2 and 3, by
18 credible evidence beyond a reasonable doubt, then you should
19 convict her of these two counts.

20 On the other hand, if you find that the govern-
21 ment has failed to prove any one or more of these elements
22 as to each one of these two counts, then you would acquit
23 her and you are obliged to acquit her where you find there
24 was such failure.

25 As far as the defendant James is concerned, he
is only named in two counts, namely, the conspiracy count,

2 which we have just gone through a minute ago, and a sub-
3 stantive count, a count which is the fourth count. Miss Wiley
4 is not mentioned in that. The same statute is used here
5 except the date is the 31st. The location is in the Southern
6 District of New York, the same; the manner in which the
7 defendant was acting was unlawfully, willfully, and knowingly,
8 and so you go through these elements just the same way as you
9 did with Miss Wiley. If you find that the government has
10 proven every one of these elements by credible evidence
11 beyond a reasonable doubt, then you should convict the
12 defendant of this charge, the defendant James, of this charge
13 contained in Count 4.

14 If you find, on the other hand, that the govern-
15 ment has failed to prove any one or more of these elements,
16 or all of them, then it is your obligation to acquit the
17 defendant James.

18 In reference to the defendant Wiley, Miss Wiley,
19 through her lawyer, has indicated to you that there is not
20 any question that she had knowledge of a lot of these
21 activities that were going on, and his point is though she
22 had knowledge, she was not really a participant and she was
23 just there. She was there by her mere presence and that was
24 it.

25

2 Of course, if you are satisfied that the govern-
3 ment has not proven that she was a participant beyond a
4 reasonable doubt, then it is your obligation to acquit her.

5 The same position is involved in the other two
6 charges against her. Of course, the government claims this
7 is almost silly, as you heard the Assistant argue: How could
8 she go through so many things and listen to so many things
9 and still not know anything about it? She was a participant.
10 She did take part in it. She did know what was going on.
11 That's where you stand as far as the defendant Wiley is con-
12 cerned.

13 You have heard the argument of both sides. It is
14 up to you to make a decision. Use the principles of law I
15 have expounded to you and arrive at what you think is the
16 proper judgment according to your own consciences.

17 As far as James is concerned, you see when a man
18 joins a conspiracy that is in existence he becomes as liable
19 as anybody else. You don't have to be in a conspiracy from
20 the beginning. If you join a conspiracy and you know you are
21 joining a conspiracy, and you are doing it unlawfully,
22 knowingly and willfully, you become responsible for that
23 conspiracy just like everybody else. You are in it.

24 Now he claims: I know nothing about this. I
25 was here and I was there, and I was in the company of a man,

2 but I don't know anything about it.

#30 3 So as far as his position is determined, there
4 is a failure of proof because the officer says she didn't
5 talk to him and didn't see him and didn't get anything from
6 him. She gave him no money.

7 On the other hand, the government says: Wait a
8 minute. Look at what happened. Look at what happened
9 especially on the 31st. Follow that series of events. Could
10 a man do all of those things and not know anything about it,
11 not be a part of it?

12 So here you have the same kind of argument, which,
13 again, you have to resolve. It is up to you to do that and
14 do it according to your conscience.

15 Everybody agrees that sympathy and bias play no
16 part in the trial of a lawsuit. It is not part of the case.
17 We have places to go if we want sympathy and we have places
18 to go to look for solace. What we expect in a courtroom is
19 that the people will get, what we say in the vernacular, a
20 "fair shake," and in order to accomplish that, what the law
21 does is say we get a jury who doesn't know anybody, has no
22 bones to pick with anybody, listens to the case, and then
23 decides from what is heard in the courtroom, not what is
24 learned some place else or not what somebody else told you
25 about something. If you didn't hear it here in the courtroom

2 and didn't see it in the courtroom, it is not part of the
3 case. That's the oath you took. If you don't abide by it
4 you are stultifying your oath.

5 Punishment has no part of your discussions
6 whatsoever. It can't help you in deciding the case. It is
7 not a factor in the case.

8 In the second place, the only one that has any-
9 thing to do with punishment, if it becomes necessary -- and
10 I don't suggest that because I am discussing punishment that
11 I think that these defendants are guilty -- I don't make that
12 judgment -- but I have to inform every jury that listens to
13 me during the course of a criminal case that punishment is
14 no part of the case whatsoever, and you may not discuss it
15 amongst yourselves, and it may not be part of your judgment.
16 If there is any punishment it will be on the part of the
17 Court to do that. You have nothing at all to do with it.

18 Mr. Foreman, I am going to hand up this indict-
19 ment. I want you to write on there, as I indicate to you,
20 that as far as Miss Wiley is concerned, you should only con-
21 sider Counts 1, 2, and 3.

22 Have you written that down some place? Write it
23 on the paper. She has nothing to do with Count 4. Don't
24 discuss her in Count 4. You can discuss her only in Counts
25 1, 2, and 3.

2 As far as James is concerned, you are only to
3 discuss Counts 1 and 4. I have as a matter of law dismissed
4 the other two, 2 and 3. You don't discuss James in the other
5 counts. Only 1 and 4.

6 Is that clear to you?

7 THE FOREMAN: Yes, sir.

8 THE COURT: I want to make sure you decide what
9 you are supposed to decide, and don't decide two of them that
10 I have decided already as a matter of law. That's clear to
11 all jurors.

12 Is there anyone that is confused by that?

13 If there is any time you come to a point where
14 you can't agree on what the testimony was and there are dis-
15 agreements between you as to what somebody said or didn't
16 say, we have the minutes of the trial here. You can come in
17 and listen to the witness. Tell us which witness you want
18 and what part of the witness' testimony you want so the
19 reporter can find it. He has it among his notes and it will
20 take a little doing.

21 You do that in writing. put it in a sealed
22 envelope and send it out. If you have any questions, that's
23 what you do. Write it on a piece of paper and put it in a
24 sealed envelope and give it to the marshal who will deliver
25 it to me.

2 I have one more talk with the lawyers before you
3 get the case.

4 The verdict must be unanimous. All twelve of
5 you must agree as to any one of the charges that you are dis-
6 cussing. Keep that in mind. It must be a unanimous verdict.

7 (At the side bar.)

8 MR. JACOBS: The only exceptions are with regard
9 to your Honor talking about mere presence and mere knowledge.
10 It seems your Honor said mere knowledge and mere presence --
11 I forget just how you explained it. You indicated that the
12 government was arguing she had knowledge, which I think is
13 confusing to the jury. If they felt she was present and had
14 knowledge, that would be sufficient to convict.

15 THE COURT: I note your exception. I don't make
16 the same evaluation you do, otherwise I would change it.

17 MR. THAU: I have the same exception as
18 Mr. Jacobs, plus one, in a sense.

19 I did argue that the proof didn't even show
20 my guy had knowledge, and if they should find I was wrong,
21 at least show knowledge, it might be suggested that --

22 THE COURT: I get your point. I will note the
23 exception.

24 MR. THAU: The last one is that I except to your
25 Honor saying that the grand jury had found that my client

2 probably did the crime.

3 THE COURT: I note your exception.

4 (In open court.)

5 THE COURT: You will remember that I mentioned
6 some of the contentions of the parties, and, of course, I
7 didn't mention them all. But you, in considering the case,
8 will remember them all and consider them because you remember,
9 for example, how Mr. Thau does not agree that his man, the
10 defendant James, had knowledge. Mr. Jacobs, on the other
11 hand, said that his client knew that the people were there,
12 and she was in the general area, and so forth. So, as I was
13 saying, listen to the contentions of both the government and
14 the defendants and then make up your own mind as to what you
15 are going to do about it, in accordance with your consciences.

16 I want to thank the two alternate jurors. We
17 thank you very much for having served, and we excuse you.
18 I am obliged to do that under the statute. You are excused
19 at this time.

20 (Marshals sworn.)

21 (At 4:10 p.m. the jury retired to deliberate.)

22 (Time noted: 5:00 p.m., jury in box.)

23 THE COURT: It is 5:00 o'clock. It is dark out.
24 I don't like to keep jurors in this part of the town after
25 hours.

2 Unless you are very close to a judgment in this
3 case, what I want to do is send you home tonight so you can
4 come back tomorrow morning and finish discussing the case.
5 I see some of the jurors shaking their heads in the negative;
6 therefore, that means they still want to discuss the case
7 tomorrow rather than stay here at the present time.

8 Is there anyone that would like to finish tonight?
9 I note that nobody is raising their hands.

10 Please keep your minds open. Don't discuss this
11 case amongst yourselves nor with anyone or form or express any
12 opinion in this matter until you come back tomorrow morning.
13 Resume your discussion with your fellow jurors. Return
14 tomorrow morning at 10:00 o'clock.

15 When you do return, return to the jury room where
16 you have been deliberating. I will be here early because
17 I have a matter at 9:30.

18 If there is anything you want to know I will be
19 glad to inform you. I take it from your demeanor, more
20 than anything else, you have not agreed as to either defendant
21 as to any of the charges, right?

22 THE FOREMAN: Right.

23 THE COURT: That means you will discuss the whole
24 thing tomorrow.

25 You are excused at this time and you may leave.

(Time noted: 5:00 p.m.)

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 UNITED STATES OF AMERICA :
5 :

6 VS. :
7 :

8 MARIE WILEY and NATHANIEL JAMES, 74 Cr 504
9 :

10 Defendant. :
11 :

12 -----X
13 B e f o r e:
14 :

15 HON. JOHN M. CANNELLA,
16 :

17 District Judge
18 :

19 New York, N. Y.
20 January 22, 1975 - 9:50 a.m.
21 :

22 A p p e a r a n c e s:
23 :

24 PAUL J. CURRAN, Esq.
25 United States Attorney for the
26 Southern District of New York
27 BY: NICHOLAS FIGUEROA, Esq.
28 Assistant United States Attorney
29 :

30 HOWARD JACOBS, Esq.
31 Attorney for the Defendant Wiley
32 :

33 ROLAND THAU, Esq.
34 Attorney for the Defendant James
35 :

36 :

37 :

38 :

39 :

2 THE CLERK: For sentence, United States of
3 America against Marie Wiley and Nathaniel James.

4 MR. FIGUEROA: Government ready.

5 MR. JACOBS: The defendant Wiley is ready.

6 THE COURT: Is the defendant James ready?

7 MR. THAU: The defendant James is not, your
8 Honor, and in connection with his nonreadiness I would like
9 to take it up in the robing room, if the Court pleases, in
10 due time, perhaps after the Wiley sentence, if Mr. Jacobs is
11 ready.

12 (Discussion at the bench among the Court,
13 Mr. Thau, and Mr. Figueroa.)

14 THE COURT: I understand you are ready, Mr.
15 Jacobs?

16 MR. JACOBS: Your Honor, the only thing is that
17 my recollection is that we did reserve motions until today.

18 THE COURT: But I think we had a meeting in
19 between when I heard everything, and then I put this over.
20 for some reason, I don't remember. But, in any event,
21 suppose you make your motions, and if I have ruled on them,
22 why, it will just simply be surplusage.

23 MR. JACOBS: Yes. As your Honor recalls, the
24 jury acquitted my client on the two sale counts and
25 convicted her on the conspiracy count. I won't belabor it.

2 The evidence here involves two dates. On the 17th my client
3 went into the bar and offered to take Detective Johnson
4 somewhere to meet somebody over on the East Side; that Clark
5 had said that there was someone over there to sell the
6 cocaine. And she did not take Detective Johnson anywhere.
7 Johnson said she only wanted to deal with Clark. She then
8 placed the phone call, went, got Clark, brought Clark back
9 to the bar, and that was the end of her participation on the
10 17th.

11 Clark then went with the detective in the bar
12 by himself and sold the drugs.

13 A week later, on the 24th, my recollection is
14 that the only participation of Miss Wiley is that she was
15 present in the car when Clark sold a quantity of drugs to
16 Detective Johnson. At no time did she ever discuss, you
17 know, price. At no time did she ever handle the narcotics
18 under any of these transactions.

19 Your Honor, I just feel that the evidence does
20 not rise to the quality that it should have been submitted
21 to the jury, and that there was insufficient evidence in
22 this case, and that your Honor should direct a verdict of
23 acquittal.

24 THE COURT: The motion is denied with an
25 exception to the defendant.

2 MR. JACOBS: Now with regard to sentence, your
3 Honor, I have just given your Honor my view, and I hope it
4 is accurate, of the evidence in this case as to my client's
5 participation. And I think that should bear on the
6 question of sentence here. Obviously --

7 THE COURT: I am trying to find out: Are you
8 ready yet?

9 MR. JACOBS: Oh, yes.

10 THE COURT: Because she has an outstanding case,
11 and I don't know what you are going to do about that.

12 MR. JACOBS: My intention, your Honor, is, Miss
13 Wiley desires to take an appeal in this case, and she wishes
14 to go to trial in the other case.

15 Now, your Honor has the other case, and I would
16 have no objection to proceeding to trial as expeditiously as
17 possible in the other case and your Honor sentencing her --
18 if she is convicted in the other --

19 THE COURT: The trouble with it is that under
20 our court rules I am not too sure that that is my case.

21 The history of this is that at some point in
22 time, earlier, because of the situation between the defend-
23 ants, namely that one was a fugitive and one was not, and
24 Miss Wiley had two charges against her, including the one
25 involving the fugitive, that there was a request made for

2 a severance, which I think I granted at the time.

3 MR. JACOBS: A request for severance and a
4 consolidation of the two cases.

5 THE COURT: And a consolidation of the two cases,
6 which was granted. And that was the only reason I did it
7 at that time. Then, following that, because the other case
8 is Judge Stewart's case --

9 MR. JACOBS: That is right.

10 THE COURT: -- then, following that, it turns out
11 that we tried this case involving her and James, which was
12 not the arrangement which was originally made where she was
13 going to be tried on all the charges against her in the one
14 trial.

15 So it is my impression that this case that is
16 open is really Judge Stewart's case, and if it is going to
17 go to trial it should be tried by him.

18 MR. JACOBS: Well, I have no great feeling that
19 way, your Honor, except the fact that if she is convicted
20 in the other case, since these events are so close together,
21 to have two separate judges sentence here, where the facts
22 are so, you know, intertwined. As I stated in my letter,
23 this is, really, you know, so far as she was concerned, was
24 all one situation here. The government, because they felt
25 compelled that there were different people here, felt that

2
they had to get two separate indictments.3
I don't know what your Honor's feeling is as to
4
whether no -- this thing should be split up and two different
5
judges should --6
THE COURT: What I would do is, since you are
7
ready for sentence and the statute says that the sentence
8
shall be imposed as soon as possible, if I recall -- that
9
is not the verbiage of it, but it is the sense of it --
10
now let us see what it says.11
Yes. "Sentence shall be imposed without
12
unreasonable delay."13
MR. JACOBS: Yes. And, of course, that can be
14
waived by the defendant.15
THE COURT: That could be waived by the defendant,
16
but the Court has some say in that, and I am not going to
17
go along with anything that delays any of the rights of the
18
parties, even if they agree to them, because I find that
19
when the Court does that, appellate courts pay no attention
20
to it sometimes. And I have in mind --21
MR. JACOBS: I just point out I have one case
22
before Judge Gagliardi now where the conviction was two and
23
a half years ago, and we are still waiting for sentence.
24
There are reasons why, good reasons, but --25
THE COURT: I know there are reasons, but

2 sometimes I am not blessed by that kind of thing.

3 In any event, since you are ready for sentence,
4 and the only question is that you also are ready to try,
5 I will be prepared to try it as soon as I can, and I am
6 sure that if Judge Stewart gets the case he will do the same
7 thing. Under the circumstances I think the sentence should
8 proceed today.

9 MR. JACOBS: We are ready, your Honor.

10 THE COURT: All right. Are you Marie Wiley?

11 THE DEFENDANT WILEY: Yes, your Honor.

12 THE COURT: Are you ready for sentence?

13 THE DEFENDANT WILEY: Yes, I am, your Honor.

14 THE COURT: Do you know any legal reason why
15 sentence should not be pronounced at this time?

16 THE DEFENDANT WILEY: No, sir.

17 THE COURT: Is there anything you want to add
18 to what has been said? I assume you saw the letter that
19 Mr. Jacobs had written on your behalf?

20 THE DEFENDANT WILEY: Yes, I did, sir.

21 THE COURT: The three-page letter explaining
22 everything?

23 THE DEFENDANT WILEY: Yes.

24 THE COURT: You told him the facts. You did in
25 addition see the letter; right?

2 THE DEFENDANT WILEY: Yes, I did.

3 THE COURT: All right. So that now is there
4 anything you want to say or any evidence you desire to
5 produce in mitigation of sentence at this time?

6 THE DEFENDANT WILEY: No, sir.

7 THE COURT: I have given the probation report
8 to both sides in this case, and I assume that they have
9 read it and that the defendant is aware of what is contained
10 in the report, which is dated January 21, 1975, and which
11 I gave to Mr. Jacobs up in my chambers earlier in the day
12 today. You did read it, did you not, Mr. Jacobs?

13 MR. JACOBS: I did, your Honor. I read it in
14 court this morning and the defendant also read it.

15 THE COURT: All right. I incorporate it into
16 this proceeding by reference, and I make it part of this
17 proceeding. I will hear you, Mr. Jacobs. I also read your
18 letter, which I just spoke to her about, which is dated
19 December 30, 1974.

20 MR. JACOBS: As I started to say before, your
21 Honor, I think one of the important factors in determining
22 the sentence in this case is what the defendant's participa-
23 tion was here.

24 Of course, the jury has spoken, so I won't argue
25 with that, but the defendant, if she truly did participate

2 in these two transactions, participated in an extremely
3 minimal way. She obviously had no control over the drugs,
4 had nothing to do with any of the financial arrangements.
5 At best she was some sort of helper for Clark, who was
6 her boyfriend, in that she went to the bar to convey a
7 message for him and was going to take the detective some-
8 where, and her car was used and in the second transaction
9 she was present and saw what was going on.

10 Obviously, there is little doubt that she knew
11 that there were drug transactions going on, no doubt about
12 that. Her participation again was extremely minimal.

13 In reviewing the presentence report and
14 discussing with the defendant, there is in her background
15 a conviction which states it was for possession of cocaine
16 and marijuana. That is her one brush with the law which
17 involves narcotics.

18 The defendant tells me that this was a case
19 in which there was a search of her suite, in which she was
20 living in the suite with a number of other people, and what
21 was involved was a residue of cocaine. This was not a
22 commercial-type transaction.

23 Her main involvement with the law previously
24 was in 1964, when she was convicted in a very substantial
25 case in Boston. It involved the former Governor up there,

2 Foster Furcolo, and she received a very substantial
3 sentence of five years. Subsequently she violated probation
4 in that case, and was sent back to prison on two different
5 occasions after that.

6 She has lived a very troubled life. Your Honor
7 sees about her psychiatric problems. She has had a number
8 of marriages. She has a number of children, several of whom
9 were brought up by other people. But, your Honor, I would
10 point out to you that her influence over these children,
11 and it has been substantial, that is, she has not abandoned
12 these children; and, in fact, as I pointed out in my letter,
13 because of a problem one of the children had she got
14 involved in this situation. Her daughter became pregnant,
15 and the defendant didn't have the funds, and the government
16 informant was kind enough to give her the funds for the
17 abortion, and therefore she owed a favor to the government
18 informer because of this.

19 Two of her children, young as they are, are
20 already in college, your Honor, in very fine schools in the
21 Northeast section, this year. The others live with her
22 aunt.

23 The defendant presently has moved back to
24 Rochester, where her roots are. She has a very good job up
25 there in a health club, making nice salary, and she tells me

2 a lot of the clients are lawyers and judges.

3 As to her pending cases in Rochester, your
4 Honor, they are cases which involve checks which were given
5 for insufficient funds. Defendant with the help of her
6 family has made restitution, and she tells me that in the
7 very near future -- in fact, one of them I think is on in
8 two days, or tomorrow -- she expects that the cases as to
9 her will be dismissed in Rochester.

10 I think this is a very difficult case for your
11 Honor to sentence, from the facts I have set out. But I
12 would ask your Honor to consider all of the facts, the very
13 minimal participation in this case, and the defendant's
14 background in imposing sentence. Thank you.

15 MR. FIGUEROA: The government has nothing to
16 add, your Honor.

17 THE COURT: At the outset I want to indicate
18 that, while the Court is aware that there are three out-
19 standing charges against her, one in the State of
20 Massachusetts for violation of parole, and the pending case
21 here in this District, and also the check case about which
22 you just spoke in Monroe County, the Court is not -- and I
23 underline not -- taking those into consideration, because
24 there has been no determination of guilt or innocence in
25 those cases, and therefore, as far as I am concerned, she is

2 innocent of those charges at this point in time.

3 This problem of drugs has been one that has
4 snowballed from time to time to the point where now it is
5 rolling down the hill; it is like one of those snowballs
6 that starts off very small and then as it rolls down it
7 gets bigger and bigger, and it doesn't seem to have lost
8 its ability to grow even now.

9 The first time Congress acted on this problem
10 was back in the 1920's, 1924 or 1925. Actually, it was
11 because of women who were taking what was an opium product
12 to alleviate certain pains they suffer from time to time.
13 I think the preparation was Lydia Pinkham, if I am not
14 mistaken. It was just an opium wine, that is what it
15 amounted to, and these people became addicted. For that
16 reason they passed the Harrison Narcotic Act in an effort
17 to control this. The Harrison Narcotic Act, of course,
18 attacked the problem by requiring that prescriptions be
19 given, that the substance be in sealed packages, that the
20 substance could not be sold except in sealed packages,
21 among a lot of other regulations which they thought would
22 control the narcotics but did not.

23 Then, of course, narcotics went into the hands
24 of other people. Some fellow in Germany invented what he
25 thought was the greatest cough mixture in the world, elixir

2 of terpin hydrate with heroin. A Swiss fellow. And it was
3 the greatest cough mixture in the world. He had substituted
4 heroin for the codeine in elixir of terpin hydrate. Of
5 course, this was the most addictive drug that is probably
6 known to man -- heroin.

7 As a result, Congress moved in again, and since
8 all these products are products which are not indigenous
9 to this country but are imported here, they figured the way
10 to do it was to stop smuggling. They passed the Jones Miller
11 Act, which they thought would do that, which was later
12 repealed. Of course, it wasn't as effective as they
13 thought it would be. One of the principal problems with it
14 was that people who were dealing with it had to know that it
15 was imported, which was a very, very onerous burden on the
16 government.

17 So then they came to the point where they have
18 this very simple act now, which is intended to control this.
19 Of course, the use of narcotics has now gotten into the
20 hands of a lot of different other kinds of people. But it
21 is a very serious problem, and I don't think anybody gainsays
22 that.

23 As a matter of fact, when Congress was discussing
24 this very act, there were many Congressmen, and serious-
25 minded Congressmen, who wanted the death penalty. Instead

2 of that, they compromised to what I think is pretty severe
3 scope of punishment for a first offender -- 15 years and/or
4 \$25,000 fine and a special parole period of at least three
5 years.

6 So that we are not dealing here with a very
7 simple problem; we are dealing with a very bad problem.
8 And we are dealing with people that are peculiar people
9 and sometimes just don't understand what the problem is.

10 I can understand it when some bird down in
11 South America or out in Turkey makes some opium derivative
12 and then passes it on as a farmer or something or as some
13 sort of a person that never knows what happens to this
14 thing, because it is not under his nose. But people that
15 are here in the United States see this in their own
16 communities, see it amongst their friends, see it amongst
17 people who are in hospitals, all kinds of programs running
18 into millions of dollars, to try and help them, methadone
19 and whatnot.

20 So that my main problem here is: How do we
21 help Congress and how do we help the purpose for which this
22 law is passed unless when people do this it is forcibly
23 brought to their attention, and anybody that knows them and
24 anybody that hears about the case that this is not the thing
25 to do.

2 Under the circumstances the defendant Marie
3 Wiley, on Indictment 74 Criminal 504, on Count 1, which is
4 the only count which she was found guilty of, is turned over
5 to the custody of the Attorney General or his duly authorized
6 representative for a term of imprisonment of seven years.
7 In addition thereto, the Court imposes the special parole
8 term mandated by the statute, namely, three years, and she
9 is remanded for that purpose.

10 MR. JACOBS: Would your Honor consider fixing
11 bail pending appeal? As I told you, the defendant wishes to
12 appeal the case. I will file --

13 THE COURT: What are her present bail conditions?

14 MR. JACOBS: There is a personal recognizance
15 bond, your Honor. She has always appeared, there has never
16 been any question.

17 THE COURT: What is the government's position?

18 MR. FIGUEROA: The government would oppose that
19 motion, your Honor, as is our policy on such occasions.

20 THE COURT: I will fix \$25,000 cash or surety
21 bond, pending appeal.

22 As far as the other case is concerned, we will
23 communicate with Judge Stewart and find out whether he
24 is eventually going to try it or I am going to try it, and
25 we will make that known to you and to the United States

2 Attorney.

3 MR. JACOBS: Thank you.

4 THE COURT: She is remanded in default of bond.

5 I have to advise you, Miss Wiley, although your
6 lawyer indicated to you that you have the right to appeal,
7 under the law I must advise you that you have the right to
8 appeal, and if you do not have funds you may appeal in
9 forma pauperis, provided you qualify for that kind of treat-
10 ment. Your lawyer will indicate to you how you do that.

11 If you want to, I will direct the clerk of the
12 court to file a notice of appeal, or are you going to handle
13 that, Mr. Jacobs?

14 MR. JACOBS: I will take care of that, your
15 Honor.

16 THE COURT: Is that all right with you, Miss
17 Wiley?

18 THE DEFENDANT WILEY: Yes, I guess so.

19 THE COURT: I didn't hear you.

20 THE DEFENDANT WILEY: Yes, I guess so.

21 THE COURT: All right.

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Certificate of Service

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I certify that a copy of this brief and appendix
has been mailed to the following:

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